

Annex v Telerep

2008 NY Slip Op 32330(U)

August 18, 2008

Supreme Court, New York County

Docket Number: 0113565/2007

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 113565/2007

INDEX NO. _____

ANNEX, ARNOLD

MOTION DATE _____

vs

TELEREP

MOTION SEQ. NO. _____

Sequence Number : 001

MOTION CAL. NO. _____

DISMISS

his motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
AUG 22 2008

COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

*It shall serve a copy of this
decision order on office of trial
support so case can be scheduled
be trial.*

Dated: Aug 18, 2008

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----X
Arnold Annex,

Plaintiff,

-against-

Telerep,

Defendant.

DECISION/ ORDER
Index No.: 113565-2007
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

FILED

AUG 22 2008

COUNTY CLERK'S OFFICE
NEW YORK

-----X
Recitation, as required by CPLR § 2219 of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Telerep n/m 3211 w/RD, SmcC affid, exhs	1
AA affid in opp w/exhs	2
Telerep's Answer w/SK affirm	3

-----X
Upon the foregoing papers, the decision and order of the court is as follows:

This is an action to recover damages on a breach of contract claim. Now before the court is defendant Telerep's motion for an order either dismissing the complaint as time barred, or because there is documentary evidence disproving plaintiff's claims. Alternatively, Telerep seeks the grant of summary judgment because there are no factual issues to be tried.

Issue was joined by Telerep on October 26, 2007 with the service of its answer. The note of issue was filed by plaintiff on March 5, 2008. Since the motion for summary judgment is timely, it will be decided on its merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

Arguments

Plaintiff, who is self represented, was hired by defendant in 1980. Defendant is in the business of selling television advertising time to national sponsors. Initially, plaintiff worked on special projects for Telerep. Later, however, by agreement between the parties dated October 25, 1983 (the "agreement"), plaintiff was promoted from the special project position to the position of Sales Account Executive.

The agreement, effective October 25, 1983, was subject to certain terms, including the following:

"3. Employee's [plaintiff's] salary as a Sales Account Executive shall be at the rate of \$95,000 per year through December 31, 1983; thereafter, Employee's salary shall be at the rate of \$75,000 per year and in addition Employee shall receive a quarterly bonus of \$2,500 at the end of each calendar quarter and monthly commissions payable at the normal times that in the aggregate (salary plus quarterly bonuses plus monthly commissions) will provide Employee with total annual earnings for calendar year 1984 of not less than \$95,000, provided the Employee's list is increased during calendar year 1984 not less than the increase in TeleRep's overall performance for 1984. In addition Employee shall receive fringe benefits in accordance with Employer's established personnel policies and shall receive a garage space for his automobile at 919 Third Avenue, New York, New York and up to \$5,000 per year toward the payment of club dues of Employee's choice."

The agreement also contains a restrictive covenant:

4. In consideration of Employer's having offered Employee a position with Employer as a Sales Account Representative and transferring Employee to said position, Employee covenants and agrees that in the event the employment relationship is terminated by Employee during the period of Employee's employment as a Sales Account Representative and before October 25, 1984, Employee shall not become an employee, partner or proprietor of, or render services for (i) any television spot sales firm or similar business which is

competitive to Employer [* * *]¹ for the period of time beginning with the termination of the employment relationship and ending on October 25, 1984.”

The agreement specifically provides that it “cannot be changed or terminated orally by the parties.”

Plaintiff and defendant's dispute is fundamentally whether the agreement expired in 1984, by its very terms, or continued beyond 1984. It is plaintiff's contention that the agreement continued until he retired in July 2007 because it was never terminated and that he has a breach of contract cause of action against Telerep because they have failed to pay him the agreed to quarterly bonus each quarter since 1984. Plaintiff seeks damages equal to the unpaid bonuses for the six years preceding the commencement of this action.

Defendant contends the agreement is unambiguous and that it ended in 1984. To support this defense, defendant relies upon sworn affidavits by two employees, the agreement itself, and memorandum to and from plaintiff shortly before this case began.

Robert Drury, its Vice President of Finance, and CEO states he became CEO in 1995. He states that in no year after 1984 was plaintiff ever paid a quarterly bonus. This, he contends, is proof that Telerep had no obligation to do so. Moreover, Drury contends plaintiff never complained about not being paid the bonus.

Drury contends that in order for an employee to be reimbursed for his or her business expenses, or club dues, the employee must submit a written request for reimbursement. Although Drury represents that the company has no reimbursement records for 1985, he nonetheless contends plaintiff never requested reimbursement for

¹Some language that is not relevant to the parties' dispute is omitted for clarity.

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those expenses either, and contends this is further "proof" plaintiff knew he was not entitled to such job "perks," despite his present arguments to the contrary.

Drury also, alternatively, "interprets" the agreement as meaning that plaintiff was guaranteed \$95,000 in compensation each year, and since he never earned less than \$95,000 in any of the years following the agreement, Telerep does not owe plaintiff any unpaid bonuses.

Sandra McCourt, Telerep's Senior Vice President, Director of Business Administration and Human Resources, states in her sworn affidavit that she has worked for defendant since the 1970's. She states that plaintiff was transferred to a division called "Tigers" and paid a salary of \$105,000 in 1985. Thereafter, according to McCourt, plaintiff's annual compensation was never less than \$95,000.

In an unsworn document to plaintiff, McCourt indicates that plaintiff has manufactured this unpaid bonus claim to "get money from Telerep to which you are not entitled." She also states that although the company continued to pay for parking, the bonus prong of the agreement ended in 1984 with the restrictive covenant.

Defendant, in the alternative, argues that even if the agreement remained effective following 1984, the payment of a quarterly bonus is not a separate obligation under the agreement, but built into the \$95,000 "floor" set for plaintiff's compensation. Thus, it is defendant's contention that the bonus did not have to be paid separately, but only to make sure plaintiff's salary never fell below \$95,000.

Plaintiff argues that it is precisely because defendant never paid him the \$2,500 quarterly bonus that he has a valid breach of contract claim against Telerep. He contends the agreement did not, by its very terms, expire at the end of 1984, as

defendant urges. Plaintiff states that initially he demanded discovery of defendant and they stonewalled him. Since then, they have provided records (albeit incomplete) for the year 1985. Among these records is a "Personnel Change Notice" from February 1985. Plaintiff contends this document proves the agreement did not expire, but continued. The notice indicates that plaintiff's salary was increased from \$75,000 - what the agreement provides - to \$111,000 per year. Thus, it is his contention that he was entitled to the quarterly bonus, plus the salary and other perquisites the parties had agreed to, even though his salary increased.

It is unrefuted that defendant continued to pay for plaintiff's parking garage privileges each year until he retired. When the company notified him in 2003 that Telerep was going to stop paying for the parking spot, he showed management a copy of the agreement. According to plaintiff, management relented and left the matter alone.

Plaintiff argues that neither Drury nor McCourt have personal knowledge of the facts, but are simply providing their own interpretations of the contract. Neither person was involved in the drafting or negotiation of the agreement, nor were they in a position of having any personal knowledge of it until the dispute about the parking spot arose in 2003. Plaintiff contends that the person he negotiated with, and who actually implemented Telerep's employment policies, is no longer working at Telerep and that policies have changed since then.

Plaintiff provides a copy of his deferred compensation agreement with defendant dated January 1, 1984 as proof he was not only a productive executive, but a high producer. As per this agreement, defendant agreed to pay plaintiff \$30,000 in deferred

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compensation. The payments were made in three installments of \$10,000 each over the course of three years beginning 1984 and ending 1986. The deferred compensation agreement states that the compensation is being paid and "expressly dependent upon ANNEX being in present status as Account Executive, in each of the years outlined . . ." The executed deferred compensation agreement is accompanied by a letter dated January 6, 1984, stating that "the award of Deferred Compensation has been made to you in recognition of your superior sales performance on behalf of the company . . ." Thus, plaintiff argues that he was promoted to Sales Account Executive in the agreement, and therefore, the agreement continued in effect until he retired.

Plaintiff contends he did, in fact, complain about not being paid the bonus. He complained to Steve Herson, the former president of Telerep, whose tenure preceded Drury. Plaintiff claims further that he ultimately decided to stop complaining because he did not want to jeopardize his employment at Telerep.

Discussion

Defendant's burden on a motion to dismiss for failure to state a cause of action is different than in connection with a motion for summary judgment.

On a motion for summary judgment, the movant has to prove its *prima facie* case such that it would be entitled to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d

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557 (1980).

Where a motion is directed to the sufficiency of the pleadings, the court must accept the facts alleged in the complaint as true, and the pleading is to be accorded every favorable inference. Morone v. Morone, 50 NY2d 481 (1980); Beattie v. Brown & Wood, 243 AD2d 395 (1st dept. 1997). Dismissal of a complaint is only warranted if all allegations contained within the four corners of the pleading, if true, nevertheless fail to raise a compensable claim. Guggeheimer v. Ginzburg, 43 NY2d 268, 275 (1977).

If a motion is based upon documentary evidence submitted by the moving party in connection with the motion (see Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1st Dept 2006]), such evidence must definitively dispose of plaintiff's claims (Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 AD2d 248 [1st dept. 1995]).

If, on the other hand, a motion to dismiss is based upon on the claim being time barred, then the court cannot simply extend the statute, but must grant the motion to dismiss. Gottlieb Contracting, Inc. v. City of New York, 49 AD3d 409 (1st Dept 2008).

Defendant's motion, whether viewed as a motion to dismiss the complaint for failure to state a cause of action, or for summary judgment, must be denied because Telerep has not met its burden on either motion for the reasons that follow. Not only has plaintiff stated a cause of action, there are many issues of fact that must be decided at trial.

Motion to Dismiss - CPLR § 213 (2)

The six-year statute of limitations applicable to contract actions begins to run when a contract is breached, or when one party omits the performance of a contractual obligation. Stalis v. Sugar Creek Stores, Inc. 295 A.D.2d 939, 940 (4th Dept 2002).

Where, however, a contract provides for "continuing performance over a period of time, each breach may begin the running of the statute anew such that the accrual occurs continuously." Stalis v. Sugar Creek Stores, Inc., 295 A.D.2d at 941. Here, because the contract obligation alleged by plaintiff is a continuing one, requiring the defendant to make certain payments each quarter and each year, plaintiff has stated a cause of action that withstands defendant's motion to dismiss on the basis that it is time barred.

Although plaintiff relies on old events, that took place more than six years before the commencement of this action, he is not seeking (nor can he recover) damages for any period beyond that allowable under CPLR § 213 (2). The plaintiff has restricted his claims to the six (6) years preceding the commencement of this cause of action. He claims that the employer failed to pay his quarterly bonus each year until he retired in 2007. Thus while he is setting forth facts pertaining to 1983, 1984, etc., this action is not time barred. Bulova Watch Co., Inc. v. Celotex Corp., 46 N.Y.2d 606 (1979).

Documentary Evidence

The documentary evidence that defendant relies upon does not dispose of plaintiff's claims. Notably, the pay stubs and other documents only highlight the many factual disputes the parties have. The agreement in dispute does not clearly, unequivocally, and definitely dispose of plaintiff's breach of contract claims. Principally, the contract does not contain an end date or state its duration. For reasons better discussed in connection with defendant's motion for summary judgment, the contract is subject to more than one interpretation.

Summary Judgment

Although the court will enforce a clear and complete written agreement according

to the plain meaning of its terms (Blonder & Co., Inc. v. Citibank, N.A., 28 A.D.3d 180 [1st Dep't 2006]), extrinsic evidence of the parties' intent may be considered if the agreement is ambiguous (W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y.2d 157, 163 [1990]).

The flaw in the parties' agreement is that it does not specify an end date and therefore, it is subject to different interpretations. Although defendant argues that the agreement terminated by its terms at the end of 1984 when the restrictive covenant ended, the document itself is ambiguous. The covenant acknowledges plaintiff's status as a valued employee, as evidenced by the increase in his compensation. This particular provision is for the benefit of the employer, in return for the payment of increased compensation and elevating plaintiff to a more responsible position at Telerep.

The provision, however, setting forth the terms of compensation are for the benefit of the employee. The agreement states that the plaintiff's salary is "\$95,00 per year" through the end of 1983, and it reflects his promotion to Sales Account Executive, even though there were only two months to the year. The agreement then goes on to state that "*thereafter* Employee's salary shall be at the rate of \$75,000 per year . . ." (*emphasis added*). The agreement also provides that "in the aggregate" plaintiff will receive "total annual earnings for calendar year 1984 of not less than \$95,000 . . ." Therefore the agreement, on the one hand, sets his new salary, but also guarantees him \$95,000 in compensation for 1984, the first year he is an account executive. It does not, as defendants argue, unequivocally combine these two concepts: that plaintiff would guaranteed \$95,000 in compensation for each year following 1984, including

bonuses and perks. The conflicting interpretations of the ambiguous language can only be resolved by extrinsic evidence of what the parties intended.

Defendant's alternative argument is that plaintiff never received compensation of less than \$95,000 any year thereafter, and therefore, Telerep fulfilled its obligation to the plaintiff. This is yet another interpretation of the agreement. The agreement, however, can also be read to provide that the quarterly bonus is payable, even when the compensation paid to plaintiff exceeds \$95,000 because the \$95,000 (minimum) guarantee was for 1984 only. This ambiguity requires a trial.

Although the contract specifically states that it cannot be terminated orally, it does not contain a prohibition against oral modifications. Rose v. Spa Realty Associates, 42 NY2d 338 (1977). Thus, it is not inconsistent for plaintiff to have been paid an increased salary after 1984, but still be entitled to the payment of the quarterly bonus, parking spot, and commissions thereafter as well. The records that have been produced by defendant are inconclusive about what plaintiff was being paid and what the payments were comprised of. Some records are barely legible.

Plaintiff has also raised issues of fact about why the defendant continued to pay some of the benefits under the agreement after 1984, but not others. For example, the parking spot was paid for as were the club dues after the putative expiration of the contract.

Conclusion

Defendant's motion to dismiss, whether based upon documentary evidence or the applicable statute of limitations, is denied. Plaintiff has stated facts that support a breach of contract cause of action against the defendant.

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Defendant's motion for summary judgment is also denied. Defendant has not met its burden of showing there are no factual disputes for trial. Even defendant acknowledges that the contract is subject to different interpretations. However, none of them is conclusively proved by the record Telerep has developed in connection with its motion. The factual disputes have to be decided before the law can be applied. see W.W.W. Associates, Inc. v. Giancontieri

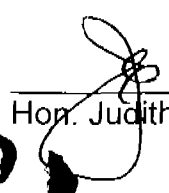
Since the note of issue was filed, this case is ready to be tried. Plaintiff shall serve a copy of this decision/order on the **Office of Trial Support, Supreme Court, New York County, 60 Centre Street, Room 158M, New York, New York 10007**, so that the case can be scheduled for trial.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
August 18, 2008

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED
AUG 22 2008
COUNTY CLERK'S OFFICE
NEW YORK